FILE COPY

FILED
DEC 1 1949
CHARLES ELMORE CROPL
CLER

94 390
Sup. Ct.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 470

ALVIN E. SANDROFF and THOMAS PAPER STOCK COMPANY, a corporation, *Petitioners,*

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ALVIN L. NEWMYER,
DAVID G. BRESS,
SHELDON E. BERNSTEIN,
Counsel for Petitioners,
1001 15th Street, N. W.,
Washington, D. C.

Of Counsel:
NEWMYER & BRESS,
1001 15th Street, N. W.,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2-3
Constitutional and statutory provisions involved	3, 31-33
Statement	3-8
Specification of errors to be urged	9
Reasons for granting the writ	9-11
Argument	11-30
I. The offense of conspiracy to falsify records of commercially packed wastepaper was not alleged, proven or submitted under proper instructions to the jury; proof of a formal conspiracy cannot be enlarged by proof of substantive offenses not contemplated by and subsequent to the agreement	11-23
II. The trial court lacked jurisdiction and venue because the overt acts relied upon were not in furtherance of the conspiracy	23-25
III. Petitioners were denied a fair trial by reason of prejudicial conduct of the trial judge	26-28
IV. Reversible error was committed in the failure to observe the mandatory requirements of Rule 32, F. R. Crim. P., prior to the imposition of sentence	28-30
Conclusion	30

CITATIONS.

CASES:

Bollenbach v. *United States*, 326 U.S. 607	22
Braverman v. *United States*, 317 U.S. 49	16
Davidson v. *United States*, 61 F. 2d. 250	19
Fleisher v. *United States*, 302 U.S. 218	14, 15

Page

Ford v. *United States*, 273 U.S. 593 12
Frantz v. *United States*, 62 F. 2d. 737 27
Glasser v. *United States*, 315 U.S. 60 18
Gomila v. *United States*, 146 F. 2d 372 28
Kotteakos v. *United States*, 328 U.S. 750 .....23, 28
Litsinger v. *United States*, 44 F. 2d. 45 18
Lonabaugh v. *United States*, 179 Fed. 476 25
Marash v. *United States*, 168 Fed. 225 18
Morris v. *United States*, 156 F. 2d. 525 21
Mulcahy v. *Regina*, L. R. 3 Eng. & Ir. App. 306 .15-16, 20
Pinkerton v. *United States*, 328 U.S. 640 16
Poulterers' Case, Court of Star Chamber (1611) ... 15
Quercia v. *United States*, 289 U.S. 466 27
Reynolds v. *United States*, 98 U.S. 145 26
Salas v. *United States*, 234 Fed. 842 19
Sandroff v. *United States*, 158 F. 2nd 623 .....1, 3, 21
Screws v. *United States*, 325 U.S. 91 22
Thornton v. *United States*, 271 U.S. 414 14
United States v. *Ault*, 263 Fed. 800 24
United States v. *Britton*, 108 U.S. 199 25
United States v. *Cohen*, 145 F. 2d 82, certiorari denied 323 U.S. 799 16
United States v. *Falcone*, 311 U.S. 205 16
United States v. *Great Western Sugar Co.*, 39 F. 2d. 152 24
United States v. *Levy*, 153 F. 2d. 995 21
United States v. *McLaughlin*, 169 Fed. 306 24
United States v. *Noble*, 155 F. 2d. 315 21
United States v. *Peoni*, 100 F. 2d. 401 16
United States v. *Pincourt*, 159 F. 2d. 917 21
Viereck v. *United States*, 318 U.S. 236 26
Williams v. *People of State of New York*, 69 S. Ct. 1079 29
Williamson v. *United States*, 207 U.S. 445 14

STATUTES:

Old Criminal Code
Section 35(A) (18 U.S.C. 80) 11
Section 37 (18 U.S.C. 88) 3, 25
New Criminal Code
Section 371 (18 U.S.C. 371) 3, 30

Page

Emergency Price Control Act of 1942
Section 1(a) 26
Section 205(b) 4, 12-13, 21, 30
Maximum Price Regulation No. 30 4
Section 1347.10 .....4, 13, 24
Rule 32, Federal Rules of Criminal Procedure 11, 29

MISCELLANEOUS:

Harno, *Intent in Criminal Conspiracy,* 89 U. of Pa. L. Rev. 624 16
Wright, *The Law of Criminal Conspiracy and Agreements,* 6, 8, 50 (Carson Ed. 1887) 16
62 Harv. L. Rev. 276 15
113 A. L. R. 1 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No.

ALVIN E. SANDROFF and THOMAS PAPER STOCK COMPANY, a corporation, *Petitioners,*

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioners, ALVIN E. SANDROFF and THOMAS PAPER STOCK COMPANY, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court for the Eastern District of Michigan (Southern Division) convicting petitioners for conspiracy to falsify records required to be kept by the Emergency Price Control Act of 1942 and regulations promulgated thereunder.

OPINION BELOW.

The opinion of the circuit court of appeals (R. 239-248) is reported at 174 F. (2d) 1014.[1]

[1] The opinion of the Sixth Circuit on a prior appeal, wherein petitioners' original convictions were reversed, appears at 158 F. 2d 623 (1946).

JURISDICTION.

The judgment of the circuit court of appeals was entered June 1, 1949 (R. 239), and a timely petition for rehearing (R. 248-254) was denied October 13, 1949 (R. 255). On November 10, 1949, Mr. Justice Reed extended the time for filing a petition for a writ of certiorari to and including December 1, 1949 (R. 255). The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code (28 U.S.C. 1254 (1)). See also Rules 37(b)(2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED.

1. O.P.A. regulations required records to be kept only of transactions in "commercially packed" wastepaper. The Government's evidence showed that petitioners, the buyers, had made a formal agreement with the sellers to falsify invoices covering sales of unpacked wastepaper. Thereafter, the sellers delivered and petitioners accepted some shipments of commercially packed wastepaper. The questions are:

(a) Whether an agreement not contemplating an offense against the United States is punishable under the conspiracy statute by reason of subsequent acts, not contemplated by the agreement, constituting substantive offenses against the United States.

(b) Whether a punishable conspiracy can be inferentially established by proof of the commission of certain substantive offenses against the United States where the prosecution's own uncontradicted and unimpeached witnesses to the agreement give direct evidence that such offenses were not contemplated.

(c) Whether the indictment, the proof and the instructions to the jury were deficient in the above regards.

2. Whether acts done by certain of the parties to an alleged conspiracy after the purposes of the conspiracy

had been effected and which acts had no tendency to aid the effectuation of the conspiracy could support the jurisdiction and venue of the trial court.

3. Whether petitioners were denied a fair trial by reason of certain irrelevant and inflammatory instructions and remarks of the trial judge impressing the jury with the fact that petitioners were guilty of some offense under the O.P.A. laws.

4. Whether the trial court committed reversible error by failing to comply with the mandates of Rule 32, F.R. Crim. P., requiring a pre-sentence investigation and that defendants be given an opportunity to make a statement in their behalf before imposition of sentence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Contained in Appendix, *supra* pp. 31-33.

STATEMENT.

On March 3, 1944 petitioners were indicted, in the United States District Court for the Eastern District of Michigan (Southern Division), for conspiring with others, in the course of purchasing wastepaper, to make and keep false records of wastepaper sales in violation of the Emergency Price Control Act and certain regulations promulgated thereunder (R. 6-13).[2] After a second trial,[3] but without any pre-sentence proceedings,[4] petitioners were found

[2] The indictment was returned under the first branch of Section 37 of the Old Criminal Code (18 U. S. C. 88; now Section 371 of the New Criminal Code, 18 U. S. C. 371) which in pertinent part provided:

"If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

[3] Petitioners' first convictions (R. 3) on the indictment of March 3, 1944, were reversed by the Sixth Circuit. 158 F. 2d 623.

[4] The facts as to the trial court's failure to observe the pre-sentence requirements of Rule 32, F. R. Crim. P., will be set out in the Argument, *infra* pp. 28-29.

guilty (R. 189-190). Petitioner ALVIN E. SANDROFF was sentenced to imprisonment for one year and one day and to pay a fine of $10,000, and petitioner THOMAS PAPER STOCK COMPANY was fined $10,000 (R. 191). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the convictions were affirmed (R. 239).

The Indictment.

In pertinent part, the indictment charged that between September 25, 1943, and November 15, 1943, petitioners conspired with Charles Ginns, Jacob Moss and Jack Ginns, not named as defendants, to violate Section 205(b) of the Emergency Price Control Act of 1942, as amended, and certain provisions of Maximum Price Regulation No. 30, as amended, in

> "That the said defendants and said co-conspirators conspired to make and keep false, inaccurate and incomplete records of proposed waste paper sales by co-conspirators Charles Ginns, Jacob Moss and Jack Ginns, to defendants ALVIN E. SANDROFF and THOMAS PAPER STOCK COMPANY well knowing that Section 1347.10 of said Maximum Price Regulation No. 30, as amended, requires, among other things, that all persons making purchases and sales of commercially packed waste paper shall keep correct records of each such purchase and sale; it being the purpose and plan of the said defendants and of the said co-conspirators to make and keep records of proposed waste paper dealings between the defendants and the said co-conspirators that would falsely, innacurately and incompletely reflect and record the particular grade, quantity and price of the waste paper proposed to be purchased by the said defendants from the said co-conspirators . . ." (R. 7-8).

The indictment then set out nineteen alleged overt acts (discussed in the Argument at p. 24, *infra*.) The indictment contained no charges of conspiracy to sell at overceiling prices, conspiracy to falsify records other than as described therein, or for any substantive offenses.

A motion to quash and demurrer was denied (R. 2). Similarly, motions for a judgment of acquital (R. 142-149), to set aside the verdict and for new trial (R. 219, 231) and for leave to file a motion in arrest of judgment (R. 217, 218) were all denied.

The Evidence.

The only evidence in the case was that adduced by the Government; none was offered by the defense. Except for the testimony of two office employees of the buyer and seller who identified certain documents relating to the sales of wastepaper to THOMAS PAPER STOCK (R. 93-103) and certain payments made by that company (R. 124-131), the prosecution rested wholly upon the testimony of Charles and Jack Ginns who were named in the indictment as two of the three persons conspiring with petitioners.[5]

The evidence viewed most favorably to the Government may be summarized as follows:

Charles Ginns and Jacob Moss of Detroit, Michigan, copartner trading as Central Waste Materials Co., have for many years been dealers in wastepaper and waste materials (R. 14-15, 41). Jack Ginns, Charles' son, on various occasions, including some of those in question, worked for this partnership but spent most of his time in other employment or worked for his own account (R. 63-64, 114-115). Almost since the inception of O.P.A. controls on waste paper, Central Waste had been regularly buying and selling at prices over the ceiling (R. 58-61) and had developed a technique for handling the money and records involved in such transactions (R. 61-62).

Around the 5th of October, 1943, in response to petitioner Sandroff's telephonic request (R. 15), Charles Ginns, accompanied by his son, went to Chicago to discuss business

[5] No action whatsoever, either civil or criminal, was even taken against either the Ginns or Jacob Moss for the over-ceiling sales made by them to petitioner Thomas Paper Stock or for similar admitted dealings with other parties prior to the transactions herein question (R. 60-62, 75-77). Moreover, similar conduct by them after the indictment in this case was returned, but before trial, was censured only by a civil consent injunction decree (R. 77-79, 91-92) for a violation of which they were fined $100 (R. 93).

companied by his son, went to Chicago to discuss business with Sandroff at the offices of petitioner Thomas Paper Stock (R. 16). Prior to this time, the Ginns had only a slight business acquaintanceship with Sandroff; there is no evidence that petitioners knew any of the details or mechanics of Central Waste Materials' operations or practices.[6] At this Chicago conference it was agreed that peti-

---

[6] Apparently to support the further inference that dealings in *commercially packed* wastepaper were contemplated by the alleged conspirators at their Chicago meeting, the court below stated that ". . . it is deductible that Ginns' regular manner of handling wastepaper was to put the material into a 'baler' . . . [and] that Sandroff knew how Ginns handled his paper . . ." (R. 242-243). The only evidence, in the entire record, however, as to the petitioners and Ginns prior relationship is the following:

[Charles Ginns]

Q. Had you done business with the Thomas Paper Stock Company prior to September of 1943? A. I think so.

Q. Do you know Mr. Sandroff? A. Yes. (R. 15.)

* * * * *

Q. When was the first time that you ever had any business dealing with the Thomas Paper Stock Company A. The first dealings?

Q. Yes. A. When; at the present time, or years ago?

Q. The first time you ever had any dealings. A. I know Mr. Sandroff when he come down to Wyandotte and brought a couple of carloads of paper, years ago.

Q. How many years ago? A. I couldn't remember.

Q. And that paper was shipped to the Thomas Paper Stock Company? A. I couldn't—it was shipped to the Thomas Paper Stock Company, or it was shipped to somebody else; but it was shipped. I couldn't tell you exactly where it was shipped.

Q. Was it sold by you to the Thomas Paper Stock Company? A. At that time, when I was in Wyandotte, I had a partner at that time, and he was doing the selling.

Q. Do you know, then, whether or not that car was sold to the Thomas Paper Stock Company or to whom it was sold? A. I know it was sold to the Thomas Paper Stock Company, all right, but I don't know if it was shipped there.

Q. I see. Now, as long as you have known Mr. Sandroff, he has been with the Thomas Paper Stock Company, has he not? A. Yes.

Q. He never was with any other concern? A. That is right.

Q. So far as you know? A. I don't know.

Q. So far as you know, he has never been in business for himself, separate and apart from the Thomas Paper Stock Company? A. I don't know that." (R. 55-56.)

[Jack Ginns]

Q. Now, when you got to Chicago, the person whom you met in the office of the Thomas Paper Stock Company was Mr. Sandroff? A. Yes.

Q. Had you known him before that time? A. Yes.

Q. And you knew your father had known him, also, before that time? A. That is right."

* * * * *

Q. And do you recall that upon that occasion Mr. Sandroff said to just throw the paper in the cars, off the trucks or wagons or peddlers, and ship it right out, never mind the baling it, but get it on the way? A. He said, put it in any shape or form in the cars.

Q. Do you remember that he said, take it off the peddlers the way they bring it in any shape or form in the cars. A. He said we could put it in the cars as it comes off the peddlers." (R. 116.)

tioners would pay the Ginns $10 a ton above ceiling for corrugated paper and $6 a ton for newspaper (R. 16), and that petitioners would be given invoices reflecting ceiling prices, paying Ginns the balance in cash (R. 16). There was no discussion about how Central Waste Material would keep its books regarding the proposed transactions (R. 68, 118).[7] As a matter of fact, Charles Ginns admitted he had already developed the technique as to these matters in similar dealings with other purchasers (R. 61, 62). Both Charles Ginns and his son testified that it was agreed at that time that the paper was not to be bailed for delivery to petitioners but sent "as is". Their testimony in this regard—the only testimony in the entire record touching upon the agreement with respect to the form in which the paper was to be shipped by Central Waste Materials to Thomas Paper Stock—was as follows:

"Q. And at that time did he [Sandroff] ask you to get paper as soon as you could? A. Yes.

Q. I think you said he said something about going down to the City Hall and buy paper, if you had to, whatever that means? A. Yes.

Q. I suppose you do go to these large buildings, do you, and collect their waste paper? A. Yes.

Q. And that is used to sell as waste paper? A. That is immaterial, to the Thomas Paper Stock Company, where I should buy my paper.

Q. Do you remember, in that conversation he had with you at that time, that Mr. Sandroff said you didn't have to bale the paper, just have the peddlers come and put it in the car, the way they get it, and send it out that way.

Miss Bloedorn: I object to that; that was not the testimony.

The Court: Let us find out if that is the testimony.

A. Yes, he tell me that". (R. 66.)

* * * * *

Q. And do you recall that upon that occasion, Mr. Sandroff said to just throw the paper in the cars, off

[7] In response to the question "There wasn't any talk by you about how you would keep your books?", Charles Ginns answered, "No. He couldn't tell me how" (R. 68).

the trucks or wagons or peddlers, and ship it right out, never mind baling it, but get it on the way? A. He said, put it in any shape or form in the cars.

Q. Do you remember that he said, take it off the peddlers the way they bring it in, and put it on the cars? A. He said we could put it in the cars as it comes off the peddlers" (R. 117.)

The record is void of evidence as to any other discussion, agreement or understanding between any of the parties, then or at any other time, with reference to the form in which the wastepaper was to be sold and shipped.

Subsequent to this Chicago conference, Central Waste invoiced and made various shipments of wastepaper to Thomas Paper Stock[8] for which payment was made by Thomas Paper Stock at over-ceiling prices.[9] Charles Ginns testified that the shipments covered by Exhibits 4 through 12—which only covered a small fraction of the total shipments made—were of baled (commercially packed) wastepaper (R. 37). His son said that "As far as I know" all of the paper sent to Thomas Paper Stock was baled (R. 123). The copies of the shipping memoranda or invoices were the falsified records upon which the prosecution's case hinged and in respect of which the alleged conspiracy related.

The factual background relating to the various alleged prejudicial errors in the conduct of the trial and sentencing will be set out in the portions of the Argument devoted to those points.

---

[8] The shipments were reflected by the seller's shipping memoranda (invoices) to which were attached the seller's copies of the bills of lading. See Exhibits 4-85, R. 194-203; see also R. 18, 25, 42, 47, 192, 194, 197, 200.

[9] Some monies were paid in advance (Exhibits 1 (R. 192), 3 (R. 194), 23 (R. 197), 47 (R. 200); see also R. 18, 25, 42, 47). Statements were periodically prepared by the buyer showing the difference between the amounts already paid and the ceiling (Exhibits 22 (R. 196-197), 46 (R. 199-200), 70 (R. 202). Payments were then received by the sellers to settle up the account (R. 111-113). Additional monies were received by the sellers representing the amount over the ceiling (R. 51, 111-113).

SPECIFICATION OF ERRORS TO BE URGED.

The circuit court of appeals erred:

1. In affirming the convictions.

2. In not reversing the convictions by reason of the trial court's error:

(a) In denying petitioners' motion to quash the demurrer to the indictment.

(b) In denying petitioners' motions for a judgment of acquital, to set aside the verdict and for a new trial and for leave to file a motion in arrest of judgment.

3. In not reversing the convictions because:

(a) The indictment was fatally deficient.

(b) There was no substantial evidence of a conspiracy to commit an offense against the United States in that the conspiracy proven did not relate to the falsification of records of a type required by any law or regulation.

(c) They rested upon an unwarranted, unique and erroneous departure from established principles of conspiracy law (as more fully reflected in the Questions Presented, *supra).*

(d) The trial court lacked jurisdiction and venue in that the overt acts relied upon for that purpose were not acts in furtherance of the conspiracy.

(e) Petitioners were denied a fair trial by reason of certain highly prejudicial remarks and jury instructions of the trial judge.

(f) The trial judge failed to comply with the mandatory requirements of Rule 32(a) and (c), F. R. Crim. P.

REASONS FOR GRANTING THE WRIT.

Certiorari is asked here to review the Government's unique thesis that conspiracy is drawn not from what men agree to do but from what they do. In this case, the Gov-

ernment's own witnesses—whose story was not disowned directly or by impeachment—was that they and petitioners had conspired to falsify records relating to proposed over-ceiling sales of *non*-commercially packed wastepaper. The pertinent law then required true and accurate records only of transactions in *commercially packed* wastepaper. On the basis solely of the testimony of these same witnesses that subsequent to the making of the conspiratorial agreement they sold and petitioners purchased some commercially packed wastepaper, the convictions were had and affirmed.

The *ratio decidendi* of the convictions is necessarily at odds with long established precedents of this and inferior appellate tribunals that conspiracy and the substantive offense are not to be confused or merged, that proof of a substantive crime does not *per se* establish conspiracy, and that the scope of a conspiracy is to be measured and established solely by reference to the agreement itself, which if for lawful purposes would be an enforceable contract, but which if for unlawful purposes paves the way for persecution. So far as petitioners can determine, this case presents for the first time to this Court the untraditional view that in spite of a well-defined and formally proven agreement not contemplating an offense against the United States (i.e. falsifications of records *required* to be kept by O.P.A.) inferences can be drawn solely from the later commission of actual offenses against the United States sufficient to support a conspiracy prosecution. (See Argument, *infra*, pp. 11-23.)

The convictions also present other serious and substantial departures from established law. Thus, the trial court's juridiction and venue were supported solely upon alleged overt acts which occurred after the purposes of the alleged conspiracy had been consumated and which could have had no tendency whatsoever to aid the effectuation of the conspiracy. The trial on charges of an alleged conspiracy to falsify invoices, which were prepared prior to shipment, was attempted to be jurisdictionally supported by allega-

tions and proof of overt acts relating to shipment from within the trial district. (See, Argument *infra*, pp. 23-25.)

Additionally, petitioners complain that they were denied a fair trial in that during his instructions to the jury, the trial judge read the inflammatory preamble to the Emergency Price Control Act, forced from petitioners an admission of their guilt of substantive O.P.A. violations and did other things of such a prejudicial character that their convictions thereafter of conspiracy to falsify O.P.A. records was an anti-climatic and foregone conclusion. (See Argument, *infra*, pp. 26-28.)

Finally, this cause presents for the first time to this Court the question whether it is reversible error for the trial judge to impose sentence without first meeting the mandatory pre-sentence requirements of Rule 32 of the Federal Rules of Criminal Procedure. (See Argument, *infra*, pp. 28-30.)

ARGUMENT.

I.

The Offense of Conspiracy to Falsify Records of Commercially Packed Wastepaper was Not Alleged, Proven or Submitted Under Proper Instructions to the Jury; Proof of a Formal Conspiracy Cannot be Enlarged by Proof of Substantive Offenses Not Contemplated By and Subsequent to the Agreement.

Because of confusion engendered by the indictment, proof and instructions to the jury, it is vital to note specifically the offense for which petitioners were prosecuted. They were not tried for conspiracy to engage in nor for engaging in transactions in violation of the ceiling prices set by the O.P.A.[10] They were not prosecuted under Section 35(A) of the Criminal Code[11] for conspiracy to falsify records in any matter within the jurisdiction of any agency of the United States. On the contrary, the

[10] But see Point III of Argument at pp. 27-28, *infra*.

[11] Old Criminal Code, 18 U. S. C. 80.

offense intended to be charged and proved against petitioners was the more limited one of conspiracy to make and keep false records relating to transactions in *commercially packed* wastepaper in violation of O.P.A. regulations.

The burden of petitioners' complaint here, which was urgently pressed upon both courts below, is that the indictment, proof and instructions to the jury failed to focus upon this particular offense, so that the convictions cannot be said to be fairly based upon the charge and proof that petitioners conspired to falsify required O.P.A. records relating to *commercially packed* wastepaper. The indictment, proof, and instructions dealt with an alleged conspiracy to falsify records of *non-commerciallly packed* wastepaper transactions which were not then substantively covered by O.P.A. regulations and on account of which, therefore, there could be no valid conviction. On the record therefore, the convictions can be sustained, if at all, only on the unique theory that the original conspiracy not envisaging transactions within the requirements and proscriptions of law was enlarged into a conspiracy to commit an offense agaist the United States by reason of later transactions encompassed by these proscriptions. But compare *Ford* v. *United States,* 273 U.S. 593 (1927), holding that an indictment charging a conspiracy to commit a particular crime cannot be sustained merely by proof of the commission of the crime itself without any proof of the conspiracy.

To understand the error below, it becomes necessary to analyze the pertinent provisions of the Emergency Price Control Act ond regulations. Section 205(b) of the Act (Appendix, infra at p. 32) makes it an offense to do any act in violation of regulations or orders promulgated under the Act or to make any statement or entry false in any material respect in any document required to be filed under the Act. One must, therefore, look to what O.P.A. regulations required. If the records proposed to be falsi-

fied pursuant to the alleged conspiracy were not *required* to be kept by the O.P.A., their falsification would not be an offense under Section 205(b), and consequently, a conspiracy to falsify such records could not be a prosecutable conspiracy to commit an offense against the United States. As of the time of the alleged conspiracy here, the only pertinent regulatory requirements were those of Section 1347.10 of Maximum Price Regulation No. 30, (Appendix at pp. 32-33, *infra*) which required only that complete and accurate records be kept relating to purchases and sales of *commercially packed* wastepaper; they did not require such records with respect to wastepaper generally.[12]

Against the background of this regulatory pattern, the indictment in pertinent part charged that petitioners conspired with the Ginns and Jacob Moss

> "to make and keep false, inaccurate and incomplete records of proposed wastepaper sales . . . well knowing that Section 1347.10 of Said Maximum Price Regulation No. 30, as amended, requires, among other things, that all persons making purchases and sales of commercially packed wastepaper shall keep correct records of each such purchase and sale . . . it being the purpose and plan of the [conspirators] to make and keep records of proposed wastepaper dealings between the defendants and the said conspirators . . . that would falsely, inaccurately and incompletely reflect and record the particular grade, quantity, and price of the wastepaper proposed to be purchased by the said defendants from the said co-conspirators . . ." (R. 18).

This indictment failed to charge that the acts which petitioners allegedly conspired to do constituted offenses

[12] Effective January 4, 1944, Section 1347.10 was amended (Appendix at p. 33, *infra*, fn. 1) to require, for the first time, records of all wastepaper transactions and not merely those in commercially packed wastepaper. The accompanying Statement of Considerations for that amendment specifically stated that in this respect, "The record-keeping provision is also expanded." The Government has made no pretense of asserting that this later amendment could be given any *ex post facto* application to the acts covered by the indictment.,

against the United States, for the videlicet itself failed to charge that the conspiracy related to *required* records, i.e., those covering commercially packed wastepaper, Nor, we suggest, was this objection (preserved by petitioners' motion to quash and demurrer) disposed of by the Sixth Circuit's reliance upon language, in *Williamson* v. *United States,* 207 U.S. 445 (1907) and *Thornton* v. *United States,* 271 U.S. 414 (1925), to the effect that an indictment for conspiracy need not allege the elements of the substantive offense involved in the same detail as would be required of an indictment for the substantive offense itself. See prior opinion below, 158 F. 2d at 625.

The error below lies in the distortion of the holdings in the *Thornton* and *Williamson* cases—which were limited to the degree of a particularity required—into the conclusion that an indictment for conspiracy to commit an offense against the United States need not contain sufficient allegations to state an offense. Neither of these cases hold, as would be required to sustain the validity of the present indictment, that in an indictment for conspiracy to commit a substantive offense the allegations relating to that offense need not be sufficient to preclude the assertion that even if everything stated in the indictment were true, nevertheless the agreement or conspiracy alleged was not one to commit an offense against the United States. While the allegations in both *Thornton* and *Williamson* were generally stated, yet in both of them substantive offenses against the United States were plainly alleged. In *Thornton,* the indictment charged a conspiracy to interfere with federal employees in the discharge of their duties under certain federal statutes, and in *Williamson* it charged a conspiracy to commit subornation of perjury.

The indictment in the instant case had essentially the same defect as that considered in the *per curiam* opinion of this Court in *Fleisher* v. *United States,* 302 U.S. 218 (1937). There a conviction (which had also been affirmed by the Sixth Circuit) was reversed because the indictment

alleged a conspiracy to possess liquor distilling apparatus without registering same with the Collector of Internal Revenue whereas the substantive law required only that it be registered with the District Supervisor of the Alcohol Tax Unit. Here, like in the *Fleisher* case, the allegations relating to the alleged substantive offense which petitioners were charged with having conspired to commit in fact constituted no offense at all because the substantive law did not require records of any kind relating to wastepaper transactions as such, but required records only as to *commercially packed* wastepaper. Thus an essential ingredient of that which would constitute a substantive offense was omitted and, accordingly, the indictment failed to charge a conspiracy to commit an offense against the United States.

More important, however, than the significance *per se* of this deficiency in the indictment, is that this omission impregnated the entire trial with the seeds of confusion which obscured from the jury that the keystone of the offense, if any, was the existence of an agreement to act with regard to records *required* to be kept by the pertinent regulation. In consequence, the conviction was built upon proof of the substantive offense of falsifying required records (those relating to commercially packed wastepaper sales) rather than upon the existence of an agreement or conspiracy which contemplated only dealings in transactions for which no records were required.

Such a conviction, cannot be rationalized within the ambit of traditional concepts of conspiracy. The crime derives largely from the *Poulterers' case,* decided in the Court of Star Chamber in 1611, wherein it was held that the mere agreement without consummation of the substantive offense could itself be criminally punished.[13] In *Mulcahy* v. *Regina,* L.R. 3 Eng. & Ir. App. 306, 317 (1868) it was said that:

---

[13] For a more detailed history of the origin and development of the conspiracy doctrine see 62 Harv. L. Rev. 276, 277 fn. 5 (December, 1948) and authorities there cited.

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act . . . When two agree to carry it into effect, the very plot is an act itself, and the act of each of the parties, promise against promise, *actus contra actum,* capable of being enforced if lawful, punishable if for a criminal object of for the use of criminal means."

The question involved in determining whether a conspiracy exists is similar to that which arises in the establishment of any partnership and the issue is "Was there a meeting of the minds?", that is, "Did the separate intentions of each of the parties meet on common ground to effect an agreement?" Harno, *Intent in Criminal Conspiracy,* 89 U. of Pa. L. Rev. 624,628 (1941). Thus, the precise nature and extent of the conspiracy can only be determined by reference to the agreement itself. *Braverman* v. *United States,* 317 U.S. 49, 53 (1942). It is the agreement and not the overt act in furtherance of the agreement which is the gist of the crime. *United States* v. *Falcone,* 311 U.S. 205, 210, (1940); *United States* v. *Cohen,* 145 F. 2d 82 (C.C.A. 2, 1944), certiorari denied 323 U.S. 799 (1945); Wright, *The Law of Criminal Conspiracy and Agreements* 6, 8, 50 (Carson Ed. 1887). And the conspiracy is not merged into any substantive offense that may follow. *Braverman* v. *United States, supra, Pinkerton v. United States,* 328 U.S. 640, 643 (1946). Particularly pertinent to this case are the remarks of Judge Learned Hand, in *United States* v. *Peoni,* 100 F. 2d 401, 403 (C.C.A. 2, 1938), where he said:

> "At times, it seems to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does. . . . Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it. . . ."

The error below stems from the failure to recognize that in accordance with these principles petitioners' criminal responsibility, if any, could be predicated upon, and only upon, evidence as to the scope of their original agreement and not upon acts engaged in by them thereafter which, while they may have constituted substantive offenses, were not contemplated by the terms of that agreement.

The only direct evidence as to the scope of the agreement between the parties was the testimony of the Ginns that there was no discussion as to commercially packed wastepaper, and, more specifically, that petitioner Sandroff told them they did not have to bale the paper but that they were just to put it on the cars for shipment the way they obtained it from the peddlers. Apparently, to lay the basis for an inference that dealings in commercially packed paper were actually contemplated by the agreement the court below stated that the Ginns regular manner of handling wastepaper was to put it into a baler for compressing and that Sandroff knew how the Ginns handled their paper. See fn. 6, *supra*. But these statements and inferences are utterly without foundation. The only pertinent testimony in the entire record is that of the two Ginns indicating that at some undetermined time, long before the alleged offenses in question, they had a single transaction with the petitioners who did business and operated in another city and state. On this meagre evidence, it would be ridiculous to pile inference upon inference—or to permit the jury to do so—to the effect that petitioners knew that the Ginns regularly baled their wastepaper and that, therefore, notwithstanding that petitioner Sandroff specifically told them to send the paper as they got it from the peddlers, he had reason to believe or know that he would receive baled commercially packed paper from Central Waste Materials. In short, the agreement neither expressly nor impliedly contemplated dealings in baled wastepaper.

Petitioners recognize, of course, that because conspirators do not typically "go out upon the public highways and proclaim their purpose,"[14] courts have recognized that proof of a formal agreement between the parties is unnecessary and that conspiracy can be established by circumstantial evidence including that relating to the conduct of the parties. See *Glasser* v. *United States,* 315 U.S. 60 (1942). But the judicial acceptance of circumstantial evidence as to what the defendants did to establish what they planned to do is obviously only a secondary method of proof to be resorted to in the absence of direct evidence as to the formal agreement. This case was the unusual one not requiring resort to such secondary methods of proof and its allowance would be pure circular reasoning, for here the Government called, utilized and relied upon the willing testimonial services of the persons who allegedly conspired with petitioners. Through the mouths of these alleged co-conspirators—who have never been punished for their part in the offenses—the Government established the precise scope, tenor and terms of the alleged conspiracy to be one confined to dealings in unbaled wastepaper and expressly excluding dealings in baled or commercially packed wastepaper. It is doubtful whether the Government, having called the Ginns as their own witnesses, could, had it so chosen, have attempted to contradict or impeach their testimony in this regard. See *Litsinger* v. *United States,* 44 F. 2d 45 (C.C.A. 7, 1930). But even assuming, *arguendo,* that under some circumstances the Government could contradict its own witnesses or impeach their credibility, nothing along this line was attempted,[15] and had it been the resulting impeachment would have eliminated the probative weight of even the alleged cir-

[14] *Marash* v. *United States,* 168 Fed. 225, 229 (C. C. A. 2, 1909).

[15] After both of the Ginns had testified clearly and unequivocally that the agreement with petitioners was that they were not to bother baling the paper and that they were to ship it as they got it from the peddlers, the Government made no attempt, by further examination of these witnesses or by any other means, to contradict this clear deliniation of the formal agreement between the parties.

cumstantial proof of the terms of the agreement, for even this evidence came from the mouths of the Ginns.

In these circumstances, the case is plainly postured upon an agreement which did not comprehend dealings in commercially packed wastepaper. It follows that to support the conviction the Government must necessarily rely upon the fact—of questionable significance[16]—that at least some[17] of the wastepaper delivered after the conspiracy was made was baled or commercially packed. Even assuming it had been shown that all the paper sold was commercially packed, this would not warrant an *ex post facto* enlargement of the original conspiracy. Thus, in *Davidson* v. *United States*, 61 F. 2d 250 (C.C.A. 8, 1932) a conviction for conspiracy to violate the National Motor Vehicle Traffic Act was reversed because the evidence merely showed that the defendants had joined a conspiracy to sell stolen cars and not that they consciously conspired with respect to interstate cars so as to bring the conspiracy within the orbit of the federal proscription. Similarly in *Salas* v. *United States*, 234 Fed. 842 (C.C.A. 2, 1916) a conviction for conspiracy to defraud the United States was reversed because even though evidence showed that the defendants conspired to defraud, it did not show that they knew the United States Government was an affected party.

Here, like in the *Davidson* and *Salas* cases, the conspiracy, if any, did not comprehend an essential ingredient of the

---

[16] Quite obviously the acute shortage of wastepaper which led to the conspiracy would have impelled petitioners to accept delivery of wastepaper in any form regardless of what may have been the understanding at the Chicago meeting.

[17] Charles Ginns, one of the partners of Central Waste Materials and the leading alleged conspirator with petitioners, merely testified that some of the deliveries—a small fraction of the total deliveries made to petitioners— were of that category. His son, Jack, testified that "as far as he knew" all of the paper delivered was commercially packed. However, since the son was only a part-time participant in the business and since his testimony was indecisive and uncertain, the only relinble evidence upon which the Government can rest is that of the father that a small portion of the paper delivered was of the commercially packed variety. Such testimony would, we submit, be completely inconclusive circumstantially from which to create an inference back that in the totality of their dealings the conspirators contemplated dealing in commercially packed paper.

substantive offense which petitioners allegedly conspired to commit; the agreement did not contemplate dealings in commercially packed wastepaper, the only transactions subject to the regulatory pattern. Suppose, for example,—assuming for this purpose that the agreement were not unenforceable by reason of illegality—that Central Waste Materials had delivered nothing but unbaled or non-commercially packed wastepaper. Could petitioners have refused to accept it? Obviously not, for under the only evidence in the case as to the terms of the agreement, petitioners specifically ordered that the paper should be sent to them "as is" and without baling. These mutual contractual obligations measure the scope of the conspiracy. *Mulcahy* v. *Regina, supra* That the parties agreed to falsify records of their dealings may have furnished the element of conspiracy, but unless they agreed to falsify records *required* by law, the agreement as such was not punishable, nor was it made so retroactively by later dealings within the scope of the law.

The confusion engendered originally by the indictment and multiplied by the proof was compounded by the trial court's charge to the jury. Approximately thirteen thousand five hundred words of instructions were given the jury, and not asingle one was pointedly to the crux of the case, that to convict petitioners it was necessary for the Government to have proved to the jury's satisfaction that the alleged conspiracy contemplated falsification of records *required* to be kept under the pertinent regulatory provisions, that is, records relating to commercially packed wastepaper. Yet, in the context of the evidence which we have analyzed, above, it was of the highest importance that the judge make unequivocally clear to the jury that the vital issue was whether the actual agreement between the parties, as distinguished from their acts, contemplated transactions in commercially packed wastepaper. Throughout the trial this had been vigorously pressed by the defense. Moreover, on the prior appeal the Sixth Circuit had directed to the trial court upon retrial to give full and careful explanatory instructions to the jury as to the meaning and appli-

cation of the pertinent statutory and regulatory provisions. See 158 F. 2d at 630. Indeed, the necessity of such a practice in O.P.A. cases particularly has repeatedly been pointed out by the appellate courts. See, e.g., *United States* v. *Noble*, 155 F. 2d 315, 318 (C.C.A. 3, 1946); *United States* v. *Levy*, 153 F. 2d 995, 998 (C.C.A. 3, 1946); *Morris* v. *United States*, 156 F 2d 525, 529 (C.C.A. 9, 1946); *United States* v. *Pincourt* 159 F. 2d 917, 919 (C.C.A. 3, 1947).

The trial court's instructions were a masterpiece of obscurity. The court first read pertinent (and impertinent —see Point III, *infra*) provisions of the Emergency Price Control Act (R. 152, 155) and of Maximum Price Regulation No. 30, including Section 1347.10 (R. 155, 158). This was followed by the text of the conspiracy statute (R. 158, 159) and an almost verbatim reading of the entire indictment (R. 159, 161) which, as we have previously shown, itself failed to focus upon the vital element of the offense, i.e., that the alleged conspiracy contemplated dealings in commercially packed wastepaper. Following his reading of the indictment, the trial judge stated to the jury:

> "Now, that is what these defendants are charged with in this indictment; that they conspired, agreed, planned with the other persons named, and read by me to you from this indictment, to violate a certain law of the United States." (R. 161)

Finally, after a lengthy explanation of the nature of the crime of conspiracy and its ingredients, the court said:

> "If you believe . . . that a conspiracy did exist as outlined in this indictment, and that the defendants . . . intentionally joined it in order . . . to launch it for the purpose of keeping those invoices . . . falsified . . . then . . . you would find both defendants guilty."

Nowhere in all of this was there a single explanatory word about the necessity of finding that the conspiracy contemplated dealings in *commercially packed* wastepaper. "A conviction ought not to rest on [such] an equivocal direction

to the jury on a basic issue." *Bollenbach* v. *United States,* 326 U.S. 607, 613 (1946).

No doubt the Government will argue, as it did below, that there were bits in the charge—the allegation of the indictment as to criminal knowledge and in the text of the regulations—from which the jury was advised that the case turned on proof of an agreement (not acts) to deal in commercially packed wastepaper not merely wastepaper. We suggest that lawyers, let alone laymen, might have had difficulty in extracting this from the volume of words and law amassed in the charge. Moreover, it is no answer to point out pieces of the charge relating to this issue which the jury might have absorbed, because the jury should not be reduced to jig saw puzzle techniques in order to arrive at the pattern for their deliberations. In *Screws* v. *United States,* 325 U.S. 91, 107 (1945), this Court said that even in the absence of an exception to the trial court's charge,

> "where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged wih a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

Here, is not simply a case of an omission to a charge which slipped through at the time of trial without notice, for the matter was forceably brought to the trial court's attention (R. 143, 145), and yet the court not only failed to charge clearly and specifically that an intention to deal in commercially packed wastepaper was a necessary ingredient of the conspiracy, but on the contrary, affirmatively, in two distinct parts of the charge, used language which must have misled the jury to believe that so long as "wastepaper" was the subject matter of the alleged conspiracy, it was entirely irrelevant whether it was intended that the paper was to be commercially packed or not. Even were there, contrary to what we have shown, substantial evi-

dence that the actual agreement between the parties contemplated dealings in commercially packed wastepaper, the absence of a clear instruction on this element of the offense would require a reversal of the conviction, because as this Court has noted in *Kotteakos* v. *United States*, 328 U.S. 750, 764-766 (1946):

> "To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. Cf. *United States* v. *Socony-Vacuum Oil Co.*, supra (310 U.S. at 239, 242, 84 L. Ed. 1176, 1178, 60 S. Ct. 811). In criminal causes that outcome is conviction. This is different, or may be from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other man, not on one's own, in the total setting.
>
> * * * * *
>
> "If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

II.

The Trial Court Lacked Jurisdiction and Venue Because the Overt Acts Relied Upon Were Not in Furtherance of the Conspiracy.[18]

It is axiomatic, of course, under the pertinent constitutional and statutory provisions (Appendix *supra*, p. 31),

[18] This matter was thoroughly discussed with the trial judge (R. 138) and posed as one ground for the motion for judgment of acquital (R. 142). It was again urged by motions in arrest of judgment (R. 218) and for a new trial (R. 219).

that conspiracy can only be prosecuted where it is hatched or where overt acts are done to further it. Since the alleged conspiracy here was born in Chicago, it becomes necessary to analyze the overt acts upon which the Detroit court's jurisdiction was based.

As shown by the opinion below, of the nineteen overt acts alleged in the indictment only those numbered I to V, inclusive, are pertinent to this inquiry.[19] Each of these are to the effect that Charles Ginns on certain designated dates shipped and caused to be shipped carloads of wastepaper from Detroit to and for the account of petitioners. Assuming—which is not clear from the evidence—that such shipments were in fact made from Detroit, nevertheless there is no basis for concluding that they in any way furthered the conspiracy charged. The indictment attempted to charge a conspiracy to falsify records required by Section 1347.10 of Maximum Price Regulation No. 30 with respect to sales of commercially packed wastepaper. However, the facts as to the shipment of the goods were not required to be kept by that regulation. Thus, only by the most strained and unnatural construction could it be said that the shipment had anything to do, directly or indirectly, with furthering a conspiracy to falsify records required by that regulation. The shipment in no way contributed to carrying into effect the object of the alleged conspiracy. Cf. *United States* v. *Great Western Sugar Co.*, 39 F. 2d 152 (N.D. Neb. 1930); *United States* v. *McLaughlin*, 169 Fed. 306 (D.M., 1908); *United States* v. *Ault*, 263 Fed. 800, 803 (W.D. Wash. 1920).

This becomes apparent when it is considered that the purpose of requiring an overt act is to afford a *locus*

[19] Only overt acts I through V, XVII, XVIII and XIX were laid in Detroit. Overt Acts XVII and XVIII deal with the delivery of wastepaper by one Rotenberg to Charles Ginns at Detroit in respect of which there was no attempt by the prosecution to show that they were in furtherance of, or even related to, the alleged conspiracy to falsify records. No. XIX deals with the activities of one C. Crane of Chicago who purportedly registered in a hotel in Detroit and purportedly was in some way connected with the petitioners, but the Government did not contend below, and we assume it will not contend here, that his activities were in any way related to the conspiracy in question.

penitentiae so that before the act planned is done either one or all of the parties may abandon their design and thus avoid the penalty of the statute. See *United States* v. *Britton*, 108 U.S. 199, 204, 205 (1883). Let us suppose that after the Ginns had shipped the wastepaper from Detroit they had repented and notified petitioners that they did not intend to go through with the conspiracy and that their records would reflect the true facts. Certainly, the Ginns could thus withdraw from the conspiracy and the act of shipment thereafter could not further the conspiracy. Moreover, it appears from the evidence that the false records of each sale (i.e. the shipping memorandum or invoice to which the alleged conspiracy related) were executed and, for aught that is shown by the evidence, title itself passed to petitioners prior to actual delivery for shipment, so that the shipment itself came after the purposes of the conspiracy had been consumated. Thus the shipment could not possibly have been an act "to effect the object of the conspiracy"[20] since that object had already been effected. It might be that shipment would tend to effect a conspiracy to buy and sell at over-ceiling prices, but certainly it is impertinent to an alleged agreement to falsify purchase records. Such acts, therefore, were insufficient to support the trial court's jurisdiction and venue, for as it was said in *Lonabough*, v. *United States* 179 Fed. 476, 481, (1910):

> "Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction".

---

[20] 18 U. S. C. 88 *supra*, fn. 2.

III.

Petitioners Were Denied a Fair Trial By Reason of Prejudicial Conduct of the Trial Judge.

The combined impact of three different phases of the judge's charge to the jury must have created an atmosphere of hostility which could hardly have left the jury to approach their deliberations in an impartial and unprejudiced state of mind.

Without reason, the trial judge early in his instructions read to the jury the preamble of the Emergency Price Control Act (Section 1(a)) referring to the prevention of "profiteering, hoarding, manipulation, speculation and other disruptive practices" (R. 151-152). A recital of this character might well be necessary to demonstrate and support the constitutional propriety of the legislative action taken, but it could hardly be appropriate to the creation of an unbiased atmosphere for a jury's deliberations. Indeed such an appeal to the passions and prejudices of the jury should meet prompt appellate rebuke. See *Viereck* v. *United States,* 318 U.S. 236 (1943); *Reynolds* v. *United States,* 98 U.S. 145 (1878).

Moreover, the effects of this inflamatory opening instruction were intensified by other highly prejudicial remarks made during the charge. Although there was not one scintilla of evidence in the record that any conspiracy existed prior to the Chicago meeting of the Ginns and Sandroff and although petitioners were charged with forming a conspiracy not joining a pre-existing one, the trial judge charged the jury that:

> "One who joins a conspiracy after its formation . . . is a party to the conspiracy". (R. 165)

He then pointed out that violations of the law "were running some months before" defendant Sandroff entered the picture (R. 168). He told the jury that:

> "It would be just too bad for anybody to come in later and know what the purpose of that Detroit conspiracy was; to join forces . . ." R. 169),

and said that if petitioners

> "came in as co-conspirators after the conspiracy was in existence, and . . . intentionally joined it in order to . . . continue it . . . you would find both defendants guilty" (R. 169).

All of this may be good law, but it had nothing whatsoever to do with the case, and it may have given the jury the impression that petitioners were part and parcel of a continuing and long standing conspiracy to thwart the law.

Similarly, the trial judge made repeated references to the prior unlawful conduct of Charles and Jack Ginns—for which, of course, petitioners were not criminally responsible—and continuously referred to the Ginns as "co-conspirators" as though their guilt and, therefore, that of petitioners was in effect an established fact. Later attempts by the trial court to correct these harmful impressions (R. 184) were patently "ineffective to correct the mischief already done." *Franz* v. *United States,* 62 F. 2d 737, 740 (C.C.A. 6, 1933). A brief admonitory correction of such oft-repeated errors cannot visciate the effects of the errors repition upon the minds of the jury. *Cf. Quercia* v. *United States,* 289 U.S. 466, 472 (1933).

Finally, in the midst of the hostile atmosphere thus created, the instructions to the jury were interupted by the trial judge's remark that

> "I think it has been admitted here, and if I am wrong in this, I want counsel to correct me immediately; but I think it has been admitted by the defense counsel that the defendants are—he has admitted that the defendants have violated the provisions of the Regulation as disconnected from any conspiracy, but that they did not agree and conspire to violate the Emergency Price Control Law under which the Regulation

was written. Am I correct in that statement?" (R. 171).

This obviously put counsel for petitioners in a highly embarrassing position and he had no alternative but to reply:

"Mr. Gallagher: That is right, your Honor. We never have questioned that matter, at all. We freely confessed our responsibility, and at no time have we challenged that" (R. 171).

The effect of this colloquoy was in no wise ameliorated by the court's having previously told the jury that petitioners were not on trial for a substantive violation of an O.P.A. regulation. The trial judge focused their attention on and forced an admission of guilt which could not have escaped influencing their views as to the petitioners' guilt on the conspiracy charge, particularly since, as we have previously shown, the evidence and instructions as a whole must have left the jury in utter confusion as to the precise nature of the offense for which petitioners were being tried.

The cumulation of these ill-considered prejudicial remarks cannot be treated as harmless. *Gomila* v. *United States,* 146 F. 2d 372, 376 (C.C.A. 5, 1944). At the least, one is left in grave doubt as to whether their combined impact did not have substantial influence on the verdict rendered. *Kotteakos* v. *United States,* 328 U.S. 750, 764-765 (1946).

IV.

Reversible Error was Committed in the Failure to Observe the Mandatory Requirements of Rule 32, F.R. Crim. P., Prior to the Imposition of Sentence.

Immediately after the jury was polled, and without any attempt to afford petitioners an opportunity to make a statement on their behalf or to present information in mitigation of punishment, the court imposed sentence (R. 190-191). Moreover, there is nothing in the record to show

that prior thereto a pre-sentence investigation and report had been made.

This summary disposal of petitioners was contrary to the specific mandates of paragraphs (a) and (c) of Rule 32 of the Federal Rules of Criminal Procedure (Appendix *infra* at p. 33) which expressly command that such pre-sentence procedures "shall" be observed. While this Court has never specifically passed on the question whether the failure to comply with Rule 32 infects the judgment with reversible error, an affirmative conclusion is to be gathered from the language of the rule, its history and the history of similar requirements in the several states. See extensive annotation 113 A.L.R. 821, 829 *et seq.*, summarized to the following effect:

> "In some jurisdictions, frequently under special statutory provisions, where an accused is convicted of a felony which is not a capital offense, the court is required to ask if he has anything to say before sentence is pronounced; *and a judgment omitting this formality is generally considered erroneous in such jurisdictions*" (emphasis supplied).

Just last term this Court took the occasion, in *Williams* v. *People of State of New York*, 69 S. Ct. 1079 (1949), to point out at some length the socialogical and criminalogical reasons why it was "essential" that pre-sentence procedures be utilized. 69 S. Ct. at 1083. And with respect to state court actions in this regard, this Court made the pertinent observation that "the sentencing procedure is [not] immune from scrutiny under the due process clause". 69 S. Ct. at 1085.

It is no answer—as suggested below (R. 247)—that after sentence was imposed, petitioners offered no statement. Obviously since the trial judge had already summarily made up his mind any statements or protests would have been futile. Nor is the error cured by suggestions that the trial judge possessed the quality of mercy in that he imposed imprisonment for only half the time which his predecessor pronounced at the first trial (R. 247), because

the sentence imposed was in excess of the maximum allowed for the substantive offense. See Section 205 (b) of the Emergency Price Control Act (Appendix, *infra* p. 32) limiting punishment for falsifying records to a maximum of one year. Compare Section 371 of the new Criminal Code (18 U.S.C. 371) providing in part that:

> "If . . . the offense, the commission of which is the object of the conspiracy is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor".

One may well inquire as to why the trial judge seemed uninterested in pre-sentence proceedings where petitioners were, so far as can be determined, the only purchasers ever prosecuted for O.P.A. violations and the sellers (the only substantial witnesses against them), who were admittedly guilty of a long history of such offenses both before and after the ones involved, completely avoided criminal prosecution.

CONCLUSION.

The questions presented raise serious and substantial questions of importance in the administration of criminal jutice, and the decision below, *inter alia,* rests upon an application of the law of conspiracy stretched far beyond its traditionally accepted limits. Only this Court can resolve these questions and furnish the requisite doctrinal guidance to the lower federal courts. We therefore respectfully submit that this petition for a writ of certiorari should be granted.

ALVIN L. NEWMYER,
DAVID G. BRESS,
SHELDON E. BERNSTEIN,
Counsel for Petitioners,
1001 15th Street, N. W.,
Washington, D. C.

Of Counsel:
NEWMYER & BRESS,
1001 15th Street, N. W.,
Washington, D. C.

December, 1949.

APPENDIX.

The pertinent venue provisions of the Constitution and Federal Statutes are as follows:

Article III, Section 2, U. S. Const.

"The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed. . . ."

Sixth Amend., U. S. Const.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ."

R. S. Sec. 731 (28 U. S. C. Sec. 103)

"When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committeed in either, and may be dealt with, inquired of, tried, determined, and punished in either district in the same manner as if it had been actually and wholly committed therein."

The pertinent provisions of the Emergency Price Control Act of 1942, Act of January 30, 1942 (c. 26, Tit. II, 56 Stat. 33), as amended by Acts October 2, 1942 (c. 578, sec. 7(a), 56 Stat. 767) and July 16, 1943 (c. 241, 57 Stat. 566) are as follows:

"Sec. 2 . . .

(g) Regulations, order, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof" [50 U. S. C. App'x, sec. 902(g)].

"Sec. 4. Prohibitions.

(a) It shall be unlawful . . . to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or

section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing" [50 U.S.C. App'x sec. 904(a)].

"Sec. 202 . . .

(b) The administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity . . . to make and keep records and other documents, and to make reports. . . ." [50 U.S.C. App'x, sec. 922(b)].

"Sec. 205 . . .

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment. . . ." [50 U.S.C. App'x, sec. 925]

Maximum Price Regulation No. 30, issued November 21, 1942, effective November 27, 1942, 7 Fed. Reg. 9732, provided:

"Sec. 1347.10 . . .

(b) Every person making purchases or sales of commercially packed wastepaper shall keep for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942 shall remain in effect, complete and accurate records of each purchase or sale of wastepaper showing the following:

(1) Date of Purchase or sale.
(2) Name and address of the buyer or seller.
(3) Grade of wastepaper purchased or sold.
(4) Quantity of each grade purchased or sold.
(5) Prices paid or received.
(6) Warranties, if any given or received.

Such records shall set forth separately the f.o.b. point of shipment price, the origin and destination of the shipment, the means of transportation used, the

amount of the transportation charge, and any other amounts paid or received in connection with such sale.'"[1]

"Sec. 1347.11

(a) When used in this Maximum Price Regulation No. 30, the term:

* * * * *

(5) 'Commercially packed' means packed in *machine compressed* bales or by an optional method of packing where such method is allowed in the definition of grade."

Rule 32, Federal Rules of Criminal Procedure, in pertinent part provides:

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

* * * * *

(c) Presentence Investigation.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

---

[1] Subsection 1347.10 remained in effect without change throughout the period of the conspiracy alleged in the indictment (September 25, 1943-November 15, 1943). By Amendment No. 6, issued December 28, 1943, effective January 4, 1944 [8 Fed. Reg. 17483] Sec. 1347.10(b) was amended to read in pertinent part:

(b) Every person who purchases or sells *commercially packed* wastepaper . . . shall make and shall keep for inspection . . . complete and accurate records of each purchase or sale or wastepaper by him, *whether or not the same be commercially packed,* showing the following:

(1) Date of purchase or sale.
(2) Name and address of the buyer or seller.
(3) Grade of wastepaper purchased or sold.
(4) Quantity of each grade purchased or sold.
(5) *Whether the wastepaper purchased or sold was commercially packed or in other condition.* [Emphasis supplied.]

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes, regulations, and rules involved	2
Statement	2
Argument	6
Conclusion	17
Appendix	18

CITATIONS

Cases:	
Brown v. *Elliott*, 225 U. S. 392	11
Gayon v. *McCarthy*, 252 U. S. 171	11
Glasser v. *United States*, 315 U. S. 60	8
Hyde v. *United States*, 225 U. S. 347	11
Sandroff v. *United States*, 158 F. 2d 623	3, 8, 10
Thornton v. *United States*, 271 U. S. 414	8
United States v. *Austin-Bagley Corp.*, 31 F. 2d 229, certiorari denied, 279 U. S. 863	16
United States v. *Karavias*, 170 F. 2d 968	17
Williamson v. *United States*, 207 U. S. 425	8
Wong Tai v. *United States*, 273 U. S. 77	8
Statutes:	
Criminal Code, Sec. 37, 18 U. S. C. [1940 ed.] 88	2, 18
Emergency Price Control Act of January 30, 1942, c. 26, 56 Stat. 23, as amended, 56 Stat. 767; 57 Stat. 566:	
Sec. 2	18
Sec. 4	19
Sec. 202	19
Sec. 205	3, 19
Judicial Code, Sec. 42, 28 U. S. C. [1940 ed.] 103	11, 18
Maximum Price Regulation No. 30, as amended, 7 Fed. Reg. 9732; 8 F. R. 13049:	
Sec. 1347.10 (b)	3, 6, 19
Sec. 1347.11	20
Sec. 1347.11 (a) (5)	6, 20
Rules:	
Rule 30, F. R. Crim. P	10
Rule 32, F. R. Crim. P	16, 17, 20

868032—50——1

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 470

ALVIN E. SANDROFF AND THOMAS PAPER STOCK COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 239–248) is reported at 174 F. 2d 1014.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1949 (R. 239), and a petition for rehearing was denied on October 13, 1949 (R. 255). On November 10, 1949, Mr. Justice Reed extended the time for filing a petition for a writ of certiorari to and including December 1, 1949 (R. 255), and the petition was filed on that date. The jurisdiction of this Court is invoked under

28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the indictment charged and the proof established a conspiracy to make and keep false records of transactions in commercially packed wastepaper in violation of the Emergency Price Control Act of 1942 and the applicable regulations thereunder, and whether the trial court's instructions properly defined the offense charged.

2. Whether the overt acts alleged and proved to have been committed in the trial district were overt acts in furtherance of the object of the conspiracy.

3. Whether the trial judge's charge to the jury was unfair and prejudicial to petitioners.

4. Whether the trial court in imposing sentence acted contrary to Rule 32 of the Federal Rules of Criminal Procedure.

STATUTES, REGULATIONS, AND RULES INVOLVED

These are set forth in the Appendix, *infra,* pp. 18–21.

STATEMENT

Petitioners Sandroff and Thomas Paper Stock Company, a corporation (hereafter called the Thomas Company), were indicted under Section 37 of the Criminal Code (18 U. S. C. [1940 ed.] 88), *infra,* p. 18, for conspiring with Charles Ginns, Jacob Moss, and Jack Ginns, none of

whom were indicted, to commit an offense against the United States by violating Section 205 (b) of the Emergency Price Control Act of 1942, as amended, *infra,* p. 19, and Section 1347.10 of Maximum Price Regulation No. 30, *infra,* pp. 19–20 (R. 6–13). It was alleged that between September 25 and November 15, 1943, petitioners and the co-conspirators conspired that the latter would keep records of wastepaper sales to petitioners which would falsely state the price of the paper, so that they might secure and petitioners might pay a price for the paper in excess of that permitted by the Emergency Price Control Act and MPR No. 30 (R. 7, 8).

The evidence at petitioners' second trial[1] may be summarized as follows:

Charles Ginns and his partner, Moss, were dealers in wastepaper in Detroit, Michigan, operating under the name of Central Waste Materials Company (hereafter called the Central Company) (R. 14, 15). About October 5, 1943, Charles Ginns received a call from petitioner Sandroff, the president, "who dictate[d] the rules" of the Thomas Company (R. 124, 125, 107), asking him to come to Sandroff's Chicago office because it would be worth his while (R. 15, 105).

[1] Petitioners' convictions on an earlier trial were reversed for error in restricting the cross-examination of government witness Charles Ginns in respect of promised or expected immunity. See R. 240 and *Sandroff* v. *United States*, 158 F. 2d 623 (C. A. 6).

When Charles Ginns went there with his son Jack,[2] Sandroff said that because of the shortage of wastepaper he would pay him $10.00 a ton above the O. P. A. ceiling price for corrugated paper and $6.00 a ton over ceiling for newspaper. Sandroff told Ginns to go back to Detroit and buy paper from all available sources, that the invoices should be at the ceiling prices, and that he would pay cash at the end of each week for the over-ceiling balance. Charles Ginns received from Sandroff a Thomas Company check for $1,000 on account, went back to Detroit, and started buying paper. (R. 16, 17, 105, 106, 107.)

After Crane, one of Sandroff's salesmen, went to Detroit to buy paper because Charles Ginns was not sending enough (R. 21), Charles and Jack Ginns went to Chicago and complained to Sandroff, who promised that he would not thereafter send Crane to Detroit (R. 22, 108). At this meeting, Sandroff had his employee, Mrs. McGregor, make up a purchase order for 15 cars of corrugated paper and 15 cars of newspaper at ceiling prices (Ex. 2, R. 192–193, 23), but the oral agreement was reiterated that the balance of the over-ceiling price would be paid in cash at the end of the week (R. 23, 24, 109). Charles Ginns was given a $2,000 advance on this visit (R. 25, 109, 194).

---

[2] Jack Ginns bought paper for his father and received a one-third commission on business he brought in (R. 64).

Charles Ginns testified that his company baled the paper they bought (R. 14), and that the shipments to the Thomas Company shown in Exhibits 4 through 12 were of baled paper (R. 37). He also stated that Sandroff had told him that it was not necessary to bale the paper, but that the peddlers could put it directly into the cars the way they found it (R. 66). Jack Ginns' testimony was that all the paper sent to the Thomas Company was baled (R. 123), although Sandroff had said the paper could be shipped in any form (R. 117).

The Government's evidence included a mass of exhibits of shipping memoranda or invoices with bills of lading showing that the Central Company billed the Thomas Company at ceiling prices (Exs. 4–12, R. 194–195, 34, 35; Exs. 13–21, R. 196, 35, 36; Exs. 24–34, R. 198–199, 45, 47; Exs. 35–45, R. 199, 45, 47; Exs. 48–58, R. 200–201, 48, 50; Exs. 59–69, R. 201–202, 48, 50; Exs. 71–77, R. 202–203, 52; Exs. 78–84, R. 203, 52). The evidence further showed over-ceiling payments in Chicago by Bert Derdiger, the Thomas Company office manager,[3] to Jack Ginns of $1,100 cash on October 18 (R. 111), $1,100 on October 25 (R. 112), and $650 by check on November 8, 1943 (R. 113, 114).

[3] Derdiger admitted that he was instructed regarding the payments by Sandroff or Mrs. McGregor; that on several occasions he went to the bank with Jack Ginns and gave him cash or turned it over to Sandroff; and that the extra money paid to Jack Ginns was "around from two to three thousand dollars" (R. 124, 128, 130).

On November 1, Charles Ginns received an overceiling payment of $1,150 by check from Sandroff himself (R. 51, 202).

The jury found both petitioners guilty (R. 189). Petitioner Sandroff was sentenced to imprisonment for one year and one day and fined $10,000 and the corporation was also fined $10,000 (R. 191). The Court of Appeals affirmed the convictions (R. 239–248).

ARGUMENT

1. Section 1347.10 (b) of MPR No. 30, *infra*, pp. 19–20, provided that "Every person making purchases or sales of commercially packed wastepaper shall keep for inspection * * * complete and accurate records of each purchase or sale of wastepaper showing", *inter alia*, "(5) Prices paid or received", and Section 1347.11 (a) (5), *infra*, p. 20, defined "commercially packed" as meaning "packed in machine compressed bales or by an optional method of packing where such method is allowed in the definition of a grade."

It is not denied that Sandroff and the Ginns evolved a scheme to falsify the Central Company's records of the prices received from the Thomas Company for wastepaper sold to it. Petitioners contend, however, that there was neither charge nor proof of a conspiracy involving commercially packed wastepaper; that the scheme involved only non-commercially packed paper not covered by Section 1347.10 (b), *supra*.

They also contend that the trial judge failed in his instructions to explain that petitioners could be convicted only if the jury found a conspiracy to falsify records of transactions in commercially packed paper. (Pet. 11–23.)

The indictment, in pertinent part (R. 7–8), charged that petitioners, and the co-conspirators "did unlawfully * * * conspire * * * to commit an offense against the United States of America and the laws thereof, that is to say: to violate Par. (b) of Sec. 205 of the Emergency Price Control Act * * * and Sec. 1347.10 of Maximum Price Regulation No. 30 * * *; that the said defendants and said co-conspirators * * * did unlawfully * * * conspire to make and keep false * * * records of proposed waste paper sales by co-conspirators * * * to defendants * * *; said defendants and said co-conspirators * * * well knowing that Section 1347.10 of said Maximum Price Regulation No. 30 * * * requires * * * that all persons making purchases and sales of commercially packed waste paper shall keep correct records of each such purchase and sale * * *; it being the purpose and plan of the said defendants and * * * co-conspirators * * * to make and to keep records of proposed waste paper dealings between [them] that would falsely, inaccurately and incompletely reflect the record the particular grade, quantity and price of the waste

paper proposed to be purchased by the said defendants from the said co-conspirators * * * to the end that said co-conspirators * * * might secure and defendants * * * might pay a price for waste paper in excess of that permitted to be paid and received under the said Emergency Price Control Act of 1942 * * * and said Maximum Price Regulation No. 30 * * *." We submit that the indictment was sufficient to charge a conspiracy to make and keep false records of sales of "commercially packed waste paper." It expressly referred to Section 1347.10 of MPR No. 30 and charged that the conspirators knew of its requirements in respect of sales of commercially packed waste-paper. Obviously, the sales and records referred to in the other parts of this paragraph of the indictment were sales and records involving such paper. It is not necessary to use "the same degree of detail in an indictment for conspiracy in stating the object of the conspiracy as if it were one charging the substantive offense." *Thornton* v. *United States,* 271 U. S. 414, 423. Certainty, to a common intent, sufficient to identify the offense which petitioners conspired to commit was all that was required. *Williamson* v. *United States,* 207 U. S. 425, 447, 449. Cf. *Glasser* v. *United States,* 315 U. S. 60, 66; *Wong Tai* v. *United States* 273 U S. 77, 81. The Court of Appeals properly decided on the former appeal (158 F. 2d 623, 624) that "the indictment

was sufficiently well drawn to embrace the essential elements of the conspiracy charged" and "to apprise adequately the defendants of the charges required to be met".

Petitioners' contention that the evidence did not establish a conspiracy to falsify records of transactions in commercially packed wastepaper is based upon the testimony of Charles and Jack Ginns on cross-examination that petitioner Sandroff told them they could ship the paper unbaled just as they received it from peddlers (R. 66, 117; see p. 5, *supra*). There was no evidence, however, that Sandroff directed them to ship the paper in that form. And as a matter of fact all the paper involved in the conspiracy was baled (R. 123; see p. 5, *supra*). Sandroff must have known of this from the invoices, and he continued to make or direct payment of the agreed over-ceiling prices to the Ginns (R. 51, 128).

The fact that there was no direct evidence of a formal initial agreement specifically embracing baled wastepaper does not negate the existence of a conspiracy to falsify the records of transactions in such paper. The agreement broadly covered wastepaper and the very testimony of the Ginns upon which petitioners rely shows that Sandroff wanted all the paper they could supply, baled or unbaled. The subsequent acts of the conspirators in dealing in baled paper also supports the inference that their agreement was to falsify the Central Company's records of such transactions. The

fact that the original agreement also embraced non-commercially packed paper does not exculpate petitioners.

Neither is there any merit in petitioners' assertion that the trial court's instructions did not point out the necessity of a finding that the conspiracy contemplated dealings in commercially packed wastepaper. The record does not show any objection or exception by petitioners' counsel on this score, as required by Rule 30, F. R. Crim. P., and it is clear in any event that the instructions sufficiently apprised the jury that the charge against petitioners involved only a conspiracy to falsify records of sales of baled paper. On the prior appeal, the Court of Appeals directed that on re-trial, "the court should explain to the jury the pertinent provisions of the Emergency Price Control Act and, especially, should the language of the pertinent portion of Section 1347.10 of Maximum Price Regulation No. 30 be read and explained to the jury." 158 F. 2d at 630. In complying with this mandate, the trial court in its instructions read the provisions of Section 1347.10 (R. 156–157) and the definition of commercially packed paper contained in Section 1347.11 (a) (5) (R. 158). He also explained what baling meant (*ibid.*). In addition, the court also read from the indictment the provisions of Section 1347.10 regarding commercially packed wastepaper (R. 160). We think the Court of Appeals was right in holding that the trial

court had complied with its directions on the first appeal and that the "jury was sufficiently informed that the conspiracy charged related essentially to dealings in 'commercially packed' waste paper" (R. 241).

2. Equally untenable is petitioners' contention that the District Court lacked jurisdiction and venue because the overt acts committed within the district were not in furtherance of the conspiracy (Pet. 23–25). Overt acts I through V alleged shipments of wastepaper in furtherance of the conspiracy from Detroit, "in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court", by co-conspirator Charles Ginns to petitioners (R. 8–10). Though the conspiracy was formed in Chicago, it was prosecutable in the Eastern District of Michigan if overt acts in furtherance of the conspiracy were committed there. See Section 42, Judicial Code, 28 U. S. C. [1940 ed.] 103, *infra*, p. 18; *Hyde* v. *United States*, 225 U. S. 347; *Brown* v. *Elliott*, 225 U. S. 392; *Gayon* v. *McCarthy*, 252 U. S. 171.

It is clear that the shipments in question were overt acts for the purpose of effecting and accomplishing the object of the conspiracy to make and keep false records so that petitioners might pay over-ceiling prices for wastepaper. Such shipments were indeed the ultimate object of the conspiracy, of which falsification of the Central Company's records was an integral part. Without

them there would have been no occasion for making false records, as the conspiracy contemplated. As the Court of Appeals said, "The shipments of paper were essential overt acts to effectuate the object of the conspiracy" (R. 244).

3. Petitioners complain of three short passages which they have excerpted from the trial court's instructions covering 32 pages of the record (R. 150–182). These objections are frivolous.

First, it is urged that the court's reading of Section 1 (a) of the Emergency Price Control Act (R. 151–152), with its references to "profiteering, hoarding, manipulation, speculation, and other disruptive practices" (R. 151–152), constituted "an appeal to the passions and prejudices of the jury" (Pet. 26). This occurred in the early part of the charge, when the court was explaining the statute and regulations involved in the case. At the conclusion of the charge, after the court had excused the jury to hear exceptions (R. 182), petitioners' counsel objected to this passage, among others (R. 184). When the jury was recalled to receive further instructions as the result of the exceptions made by counsel, the court adverted to its earlier references to the statute and explained (R. 185):

> Also, the court explained to the jury certain passages of the Emergency Price Control Act. The court did that, because the court felt that a short background of the act should be given for a better and fuller

> understanding of the law by the jurors, and not with any other purpose in view.

There was no further objection on this score (see R. 186–187) and it is clear from the whole context that petitioners were not prejudiced as they claim.

Next, it is contended that petitioners were prejudiced by the court's references in the main charge to the Ginns as "co-conspirators" and to the criminal liability of a person who knowingly joins an existing conspiracy (Pet. 26–27). When these instructions were called to the court's attention at the conclusion of the charge, the court agreed that the references to "co-conspirators" should be corrected and that the instructions concerning a person who joins a conspiracy were inapplicable in this case (R. 182–183). Accordingly, when the jury were recalled, the court effectively corrected and clarified its earlier instructions (R. 184–185):

> In the charge of the court to the jury, the court referred on a number of occasions to the conspirators, or co-conspirators. The court did not intend to have the jurors understand that the court has any preconceived notions that the defendants or either of them have already been stamped by law as conspirators. I should have said, and I am instructing you now, that in each instance where I stated, "co-conspirators," or, perhaps, "conspirators," I should have said, "the alleged, the al-

leged conspirators," or "alleged co-conspirators."

In other words, whether or not they were conspirators, it is for you, the jury to say, in your verdict, and not for the court to determine that fact.

I have also stated to you, during the instruction, about a person joining a conspiracy after it has already been formed. In other words, whether persons forming conspiracy, and then some outsider then comes in and, knowing the terms of the conspiracy, joins the conspiracy, the court's attention has been called to the fact that the indictment in this case does not charge a situation of that kind. The indictment charges a conspiracy was formed, a new, a fresh conspiracy, and so that any instructions that the court gave to the jurors with respect to anyone joining an existing conspiracy may be eliminated and forgotten, and only that portion of the instruction which the court gave you with reference to two or more persons forming, by agreement, understanding, and so on, a conspiracy to violate a law of the United States, is the portion of the charge that the court wishes the jurors and instructs the jurors to keep in their minds in deciding this case.

Finally, petitioners assert (Pet. 27–28) that they were irreparably prejudiced by the trial judge's action, in the course of his charge, in asking petitioners' counsel if it was correct to state that counsel had admitted that petitioners

"violated the provisions of the Regulation, as disconnected from any conspiracy, but that they did not agree and conspire to violate the Emergency Price Control Law under which the Regulation was written." Counsel replied: "That is right, your Honor. We never have questioned that matter, at all. We freely confessed our responsibility, and at no time have we challenged that." (R. 171.) We are unable to see how this colloquy placed counsel in a "highly embarrassing position," as petitioners argue. Counsel was only admitting what he had admitted throughout the trial and what the evidence clearly showed. Rather than being prejudicial, the judge's remarks were a reiteration of his earlier admonition to the jury (R. 161), which he repeated just before he asked counsel the question complained of, that petitioners "are not charged with the commission of the crime of violating the provisions of the Regulation; they are not charged with that. They are not charged with any violation of any substantive law, but they are charged with the violation of the Criminal Conspiracy Statute, of forming a conspiracy to violate." (R. 170–171.) These instructions and the question to counsel were clearly designed to impress the jury that petitioners were not on trial for their admitted substantive violations of the price ceilings, but could be convicted only if the jury found that they had entered into a conspiracy with the Ginns as alleged in the indictment. In the con-

text, the incident was helpful to petitioners, not harmful.

4. Petitioners' final contention is that the trial court failed to observe the requirements of Rule 32, F. R. Crim. P., in imposing sentence (Pet. 28–30).

Immediately after the announcement of the verdict and the polling of the jury, the court sentenced petitioners. Then, in the presence of petitioner Sandroff, the court asked defense counsel if he wished to say anything and counsel replied, "Not so far as the verdict of the jury is concerned." (R. 191.) In these circumstances, we think it is clear that petitioners were not deprived of "an opportunity to make a statement in his [their] own behalf and to present any information in mitigation of punishment," as provided by paragraph (a) of Rule 32.[4] As the Court of Appeals said (R. 247):

> While it would have been in appropriate conformity with the above rule had the district judge asked appellant Sandroff whether he desired to make a statement, it would appear from his inaction that Sandroff did not wish to do so. Though the judge posed the query, "Anything further?", neither appellant nor his attorney

[4] See *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 234 (C. A. 2), certiorari denied, 279 U. S. 863, decided before the Federal Rules of Criminal Procedure went into effect, holding that the trial judge's failure to inquire whether the defendants had any reason why sentence should not be imposed was not reversible error.

spoke up to the effect that Sandroff wished to be heard or to present information in mitigation of punishment. We cannot say that appellant was not afforded an opportunity to make a statement. There is nothing to indicate that he was shut off.

Petitioners have no standing to complain that there was no presentence investigation and report from the probation service of the court, in accordance with paragraph (c) (1) of Rule 32. In the first place, for aught that appears, such an investigation and report may have been made at the first trial. In any event, the provisions of paragraph (c) (1) are not mandatory upon the district courts, for it expressly provides that such a report shall be made "unless the court otherwise directs." *United States* v. *Karavias*, 170 F. 2d 968, 971–972 (C. A. 7).

CONCLUSION

There is no conflict of decisions and the case presents no question which warrants review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
ROBERT G. MAYSACK,
Attorneys.

JANUARY 1950.

APPENDIX

STATUTES, REGULATIONS, AND RULES INVOLVED

Criminal Code, Section 37, 18 U. S. C. [1940 ed.] 88:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Judicial Code, Section 42, 28 U. S. C. (1940 ed.) 103:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

The Emergency Price Control Act of January 30, 1942, 56 Stat. 23, as amended (56 Stat. 767; 57 Stat. 566):

> SEC. 2 * * *
>
> (g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof [50 U. S. C. App. 902 (g)].

SEC. 4. (a) It shall be unlawful * * * to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing [50 U. S. C. App. 904 (a)].

SEC. 202 * * *

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity * * * to make and keep records and other documents, and to make reports * * * [50 U. S. C. App. 922 (b)].

SEC. 205 * * *

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment * * * [50 U. S. C. App. 925].

Maximum Price Regulation No. 30, 7 F. R. 9732; 8 F. R. 13049:

SEC. 1347.10 * * *

(b) Every person making purchases or sales of commercially packed wastepaper shall keep for inspection by the Office of

Price Administration for so long as the Emergency Price Control Act of 1942 shall remain in effect, complete and accurate records of each purchase or sale of wastepaper showing the following:

(1) Date of purchase or sale.

(2) Name and address of the buyer or seller.

(3) Grade of wastepaper purchased or sold.

(4) Quantity of each grade purchased or sold.

(5) Prices paid or received.

(6) Warranties, if any, given or received.

Such records shall set forth separately the f. o. b. point of shipment price, the origin and destination of the shipment, the means of transportation used, the amount of the transportation charge, and any other amounts paid or received in connection with such sale.

SEC. 1347.11 *Definitions.*

(a) When used in this Maximum Price Regulation No. 30, the term:

* * * * *

(5) "Commercially packed" means packed in machine compressed bales or by an optional method of packing where such method is allowed in the definition of a grade.

Rule 32, Federal Rules of Criminal Procedure:

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to

present any information in mitigation of punishment.

* * * * *

(c) Presentence Investigation.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

U. S. GOVERNMENT PRINTING OFFICE: 1980